

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 30, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3703-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE INTEREST OF CHRISTOPHER M. S.,
A PERSON UNDER THE AGE OF 18:**

**FOND DU LAC COUNTY DEPARTMENT
OF SOCIAL SERVICES,**

PETITIONER-RESPONDENT,

v.

SAMUEL S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County:
STEVEN W. WEINKE, Judge. *Affirmed.*

NETTESHEIM, J. Samuel S., the father of Christopher M.S., appeals from a juvenile court CHIPS¹ order extending Christopher's

¹ See § 48.13, STATS., governing proceedings relating to a child in need of protection and services.

placement outside Samuel's home. Samuel contends that the extension was improper because the original order in this case did not provide out-of-home placement and the placement order had never been amended to provide out-of-home placement. As a result, Samuel contends that the court's order violated his procedural and substantive due process rights.

We agree with Samuel that the original placement order in this case was never formally amended to provide out-of-home placement. However, we nonetheless affirm the extension order because the juvenile court and all the parties, including Samuel, treated the placement order as functionally amended at prior extension hearings.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history are fairly involved. This case was commenced by a CHIPS petition on April 5, 1992. The petition alleged that Christopher, then age seven, had engaged in two acts of shoplifting. Section 48.13(12), STATS., 1991-92, conferred CHIPS jurisdiction over a child under the age of twelve who had committed a delinquent act.

Neither Samuel nor his wife, Barbara, appeared at the initial plea hearing. However, the guardian ad litem advised the juvenile court that he had talked to Samuel and that he expected that Samuel would not contest the petition. At the adjourned plea hearing, Barbara appeared and admitted to the petition. Samuel again did not appear. The guardian ad litem admitted to the petition on Christopher's behalf and he also stated, "I can say for the record dad would wish to do the same if he were here based on my conversations with him."

The predispositional investigation report to the juvenile court detailed Christopher's prior contacts with law enforcement. The report also

expressed concern about the physical discipline within the family unit and the lack of parental care for the children of the family. The report indicated that Samuel and Barbara had signed an agreement to decrease the amount of family violence in the home. As to placement, the report stated that “[i]ntensive services are being provided to the family in order to try to prevent placement outside of the home.”

The dispositional hearing was conducted by Judge John Mickiewicz. Barbara appeared, but again Samuel did not. Barbara stated to Judge Mickiewicz that she did not object to the recommendations in the report. The guardian ad litem stated, “[Barbara] has gone through the process before with one of the other children. Her husband knows of this and understands exactly what is going on here, and they are cooperating.”

As a result, Judge Mickiewicz entered a dispositional order finding Christopher in need of protection and services. The order required supervision by the Fond du Lac County Department of Social Services and other conditions. However, the order did not direct out-of-home placement.

Next, we address the developments which sowed the seeds for this appeal. While this order was in effect, a further CHIPS proceeding was commenced in another case involving Christopher and his parents. We will refer to this case as “CHIPS 2.” The dispositional order in the CHIPS 2 case was entered on January 26, 1994. Among other provisions, this order placed Christopher in a foster treatment home. The appellate record does not include any entries from that case. However, CHIPS 2 is referred to in the Department’s Administrative Alternate Care, Case Review and Documentation filed with the juvenile court in both cases. It is in this report that the two cases begin to merge and this case begins to take on the life of CHIPS 2. This report advised that the

dispositional order in this case was scheduled for further review on July 13, 1994. The report concluded that “Christopher will remain in foster care until the parents, especially Sam, start to cooperate and follow through with therapy and counseling.” The last entry in this report notes that copies of the review must be provided to the child’s parents.

This report was followed by the Department’s July 7, 1994 request for the first extension order in this case. The report in support of this request also references Christopher’s foster treatment care placement in CHIPS 2 and addresses the extent to which Christopher’s placement in foster treatment care has met the stated objectives of treatment, care or rehabilitation. In addition, the report evaluates Christopher’s adjustment to the placement in foster treatment care. The report concludes that Christopher’s behavior has improved under the foster treatment care and recommends that such placement continue until “the family (especially Sam) starts to cooperate and follow through with therapy and counseling.” Finally, the report goes on to detail why Christopher’s return to his home is not presently feasible. “Safety issues have continued to escalate within the [S.] home.”

The extension hearing was conducted by Judge Peter Grimm. Barbara appeared at the hearing and agreed to the extension, including the condition that Christopher continue his foster treatment care. Once again, Samuel did not appear. Based on Barbara’s agreement to the extension and Samuel’s failure to appear and further based on the reports submitted to the court, Judge Grimm granted the extension request. Judge Grimm also advised Barbara as to the conditions for obtaining Christopher’s return to the home and the consequences for failing to abide by those conditions. In addition, the written order directed that Samuel and Barbara were to cooperate with the supervised visitation plan and

included a warning to them that if they failed to remedy the conditions which resulted in the removal of Christopher from their home, their parental rights could be terminated.

It is important to note that because Christopher was already placed in out-of-home foster treatment care, the Department's case review report and extension request report included a request that such placement continue. Thus, the extension hearing in this case was conducted as if Christopher's foster treatment care placement was already in existence *in this case*. This explains why the various reports did not recite or propose any change in placement. It also explains why Judge Grimm's extension order did not recite any change in placement.

Thereafter, on January 25, 1995, the Dispositional order in CHIPS 2 expired. Thus, the only remaining order in effect at that time was Judge Grimm's extension order in this case.

On February 14, 1995, the Department filed a further case review detailing why Christopher should remain in foster treatment care, and on June 13, 1995, the Department moved for a second extension. The attached report stated that Christopher continued to require foster treatment care supervision.

This further extension hearing was conducted by Judge Mickiewicz. For the first time, Samuel appeared. Barbara also appeared. Judge Mickiewicz asked Samuel whether he was agreeing to the extension or contesting it. Sam replied, "I'm agreeing to it at this point in time." Barbara also agreed to the extension. Judge Mickiewicz granted the extension. Again, the written warnings were provided to Samuel and Barbara.

Essentially the same process was repeated leading to the third extension order which is the subject of this appeal. This time Samuel appeared and stated that he wished to contest the petition. The juvenile court then appointed counsel for Samuel, and the matter proceeded to a contested extension hearing conducted by Judge Henry Buslee.

At this hearing, Samuel stated that he did not contest a further extension, but he objected to Christopher's continued out-of-home placement. Instead, Samuel argued, as he does on appeal, that the standing order of the court was the original CHIPS order which did not recite out-of-home placement. As such, he argued for specific performance of that order. Judge Buslee rejected this argument. At a later proceeding before Judge Steven W. Weinke, Samuel renewed this objection.² Judge Weinke rejected Samuel's argument. Samuel appeals.

ANALYSIS

Samuel contends that his procedural and substantive due process rights were violated because the original CHIPS placement provision was never formally amended pursuant to § 48.357, STATS., to provide out-of-home placement. Therefore, Samuel reasons that the various extensions were of no legal effect and the original order is the controlling order regarding Christopher's placement in this case.

The Department responds that no change in placement was necessary since Christopher was already placed in foster treatment care at the time

² The purpose of the hearing before Judge Weinke was to consider the form and content of the extension order.

of the various extension orders. Thus, the Department reasons that there was no placement to be changed.

Although we ultimately reject Samuel's arguments, we reject this argument by the department. The Department's argument contends that the need for a change in placement under the statute is measured by the child's physical location at the time the juvenile court enters an order. We disagree. The change in placement statute contemplates a prior placement of the child in a prior dispositional order or extension thereof. Section 48.357(1), STATS., states in its opening sentence, "The person or agency primarily responsible for implementing the dispositional order ... may request a change in the placement of the child" Therefore, we agree with Samuel that when an existing CHIPS order recites placement in one setting and a change in that placement is sought, a change in placement proceeding is required pursuant to § 48.357.

Thus, we turn to Samuel's substantive arguments. As noted, Samuel raises arguments based on procedural and substantive due process. However, Samuel never cited any constitutional arguments or constitutional authority in the juvenile court. Instead, he simply contended that the controlling order regarding placement was the original CHIPS order in this case. We do not address constitutional issues which were not raised in the trial court. See *State v. Gove*, 148 Wis.2d 936, 940-41, 437 N.W.2d 218, 220 (1989). We hold that Samuel's constitutional arguments are waived.

Thus, we construe Samuel's argument to be of statutory dimension: whether the Department's failure to invoke the change in placement procedures of § 48.357, STATS., invalidates the extension orders in this case.

Under the unique facts of this case, we disagree with Samuel that the Department's failure to seek a formal change in placement proceeding pursuant to § 48.357, STATS., per se invalidates the foster treatment care placement in the extension orders. The fact is that these two cases became inextricably caught up with one another early on when the placement order in this case was supplanted by the later placement order in CHIPS 2 which directed foster treatment care placement for Christopher. When the Department sought its initial extension order in this case, its various reports to the court were premised on that existing state of affairs. Thus, the extension request specifically sought to continue that status. It is obvious that Judge Grimm and the parties conducted the initial extension hearing based on this understanding. The ensuing extension order was entered on the same premise. The same is true of all the ensuing extension proceedings.

Importantly, Samuel makes no claim that he did not have full and complete notice of all the proceedings which occurred in this case. At every turn the Department made clear that its extension requests included requests that the juvenile court continue Christopher's foster treatment care placement. And, the post-extension warnings which followed each hearing advised Samuel and Barbara what they must do to regain placement of Christopher in their home. Moreover, when Samuel made his first appearance in this case at the second extension hearing, he expressly agreed to the extension request which included Christopher's continued placement in foster treatment care.

Accordingly, Samuel can show no prejudice for the Department's failure to formally invoke the change in placement procedures under § 48.357, STATS. As such, Samuel must necessarily argue that such failure is not subject to a harmless error analysis but instead constitutes a per se basis for invalidating the extension orders. But Samuel cites to no authority in support of this argument.

Generally, when a party argues noncompliance with a statutory procedure, the party must show that prejudice resulted from the noncompliance. *See State v. Kywanda F.*, 200 Wis.2d 26, 37, 546 N.W.2d 440, 446 (1996). Here, the critical protections provided by the statute to a parent are the right to notice of a proposed change in placement and the right to object and obtain a hearing. Although not under the aegis of the statute, Samuel functionally received all of these protections and opportunities by the procedures in this case. He makes no argument to the contrary.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

